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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

No. 305

SARAPHIN VOGRIN, PETITIONER,

VS.

A. G. HEDSTROM, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, WITH CERTIFIED RECORD ON APPEAL FILED HEREWITH.

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1) Petitioner prays certiorari to review a judgment of the Court of Appeals for the Eighth Circuit entered April 22, 1955. Motion for rehearing duly and timely filed May 9th, 1955, and overruled May 18, 1955, without opinion.

OPINION BELOW.

2) The U. S. Court of Appeals opinion is reported in 220 F. 2d 863.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

3) Petitioner asserts she was a passenger under the controlling law of California in an automobile of defendant Hedstrom, operated and driven by him on a planned trip from Missouri to the West Coast and return, consisting of Hedstrom and his wife, his wife's brother, and petitioner, when due to his negligence on June 9, 1952, in California she was seriously injured as a result of the automobile leaving the paved U. S. Highway on a curve, running over an embankment, and colliding with a utility pole. Although petitioner stated in her complaint she was a passenger, Hedstrom for the first time at the trial on November 2, 1953, asserted petitioner was a guest and could not recover for "ordinary" negligence because of a California guest statute, and requested at the close of her evidence in chief a motion for a directed verdict to the jury which the U. S. District Court granted on the alleged ground she was a guest under the statute and could not recover, and entered judgment on November 2, 1953, on the verdict in favor of Hedstrom, dismissing the case as to the Insurance Company. Before the trip started on a proposal by Hedstrom an expressed agreement was reached and consummated whereby Hedstrom would use his automobile and petitioner was obligated for one-third of the cost of the "gasoline, oil, greasing and tire repair" on the trip, which was substantial and a tangible benefit to the driver Hedstrom, and a motivating influence for giving the transportation. An appeal was duly and timely taken to the court of appeals on the judgment in favor of Hedstrom and on April 22, 1955, the court of appeals affirmed the judgment of the trial court on the sole ground petitioner, as a matter of law, was a guest and could not

recover because of the guest statute. A certified copy of petitioner's printed record on appeal which is short is filed herewith. May 9, 1955, petition for rehearing was filed and overruled May 18, 1955. This is a diversity of citizenship case as shown in printed record (R. 4, 22). Jurisdiction of this court is invoked under title 28 U. S. C. A., Sections 1254 and 2101 (c) of the judicial code.

CERTIORARI GROUNDS, AND SPECIFICATION OF ERROR.

4) The main point and grounds upon which certiorari is invoked is the failure of the trial court and the court of appeals to heed and follow as controlling the latest rulings and holdings of the Supreme Court of California as the law of California in the case of *Whitmore* v. *French,* 37 Cal. 2d 744, 235 P. 2d 3, a recent case *in banc* decided in 1951, holding, as a matter of law, Whitmore and his wife were passengers and not guests under the California guest statute, where the riders were giving compensation for the ride under an agreement providing for a fifty (50) per cent division of the cost or expenses of a vacation and sightseeing trip from Missouri to the west coast and return which was a motivating influence for furnishing the transportation, and the case of *Harris* v. *Harfmann,* 113 Cal. App. 615, 248 P. 2d 501, decided by the California District Court of Appeals, 2d District, on October 9, 1952, which case interprets and follows the Whitmore case, holding Mrs. Harris was a passenger and not a guest, on a trip involving an agreed division of cost or expenses obligating her only for the cost of gasoline and oil on the trip.

5) It is the contention and position of petitioner that these two cases cannot be distinguished in principle, and

on the facts rule her case, and that she was a passenger under an expressed previous agreement giving compensation for her transportation or ride on an agreed division of cost or expenses, which obligated her for one-third of the cost of gasoline, oil, greasing and tire repairs, and was a motivating influence for furnishing the transportation, and not a guest under the guest statute, and that in not following these cases as controlling California law, petitioner was denied by the Court of Appeals her rights thereunder and a jury trial under *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, and *Six Companies of California* v. *Joint Highway*, 311 U. S. 180, 61 S. Ct. 186, which last named case on certiorari reverses the Ninth U. S. Court of Appeals for not following as controlling a California Court of Appeals ruling as to the law of California. Thus the Court of Appeals "has decided an important state question in a way in conflict with the applicable state law of California," calling for an exercise of this court's power of supervision.

6) The California guest statute construed in the *Whitmore* and *Harris cases, supra,* is as follows:

> "No person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride, nor any other person, has any right of action for civil damages against the driver of such vehicle or against any other person legally liable for the conduct of such driver on account of personal injury to, or the death of, such guest during such ride, unless the plaintiff in any such action establishes that such injury or death proximately resulted from the intoxication or willful misconduct of said driver."

7) In the submission of the case below, we always contended petitioner was a passenger and not a guest, as the petition and our brief will so show, thus following the designations as used by the Supreme Court of California

when construing the guest statute. We mention this because of the Court of Appeals in the opinion using the phrase "compensating guest." This statute being in derogation of the common law must be strictly construed when it is urged as a bar, as the California Supreme Court has held.

ARGUMENT AMPLIFYING THE REASONS FOR THE ALLOWANCE OF THE WRIT.

8) In *Whitmore* v. *French, Supra,* both Missourians, decided that they and their wives, with French's two sons ages 12 and 14 years would take a trip from Missouri to the west coast, and return, in French's automobile and it was previously agreed that each couple would contribute an equal amount to a common fund out of which all cost or expenses, such as gasoline, oil, meals, lodging, and sightseeing would be paid, each couple putting into a common fund as an initial contribution $100. French did all the driving and Whitmore procured maps and made suggestions as to the route to be followed. An accident in Yosemite National Park, California, occurred while on the trip, injuring Whitmore and his wife while French was driving the car, and Whitmore and his wife brought suit in California, predicated upon "ordinary" negligence of French. They recovered in the trial court and the case was appealed, and the sole ground of defense in the Supreme Court was that Whitmore and his wife were "guests" under the California guest statute and therefore could not recover. The Supreme Court held, as a matter of law, that Whitmore and his wife were passengers and that the guest statute did not bar recovery and affirmed the trial court, the court in an opinion saying:

> "The designations 'passenger' and 'guest' have been adopted for the purpose of distinguishing a per-

son who has given compensation within the meaning of Section 403 of the Vehicle Code from one carried gratuitously. *Kruzie* v. *Sanders*, 23 Cal. 2d 237, 241, 143 P. 2d 704. A person who accepts a ride does not cease to be guest and become a passenger merely by extending customary courtesies of the road, such as paying bridge or ferry tolls (see Rest., Torts, Sec. 490 Comment (a)), and it has been held that the sharing of expense does not destroy the host and guest relationship if nothing more is involved than the exchange of social amenities and reciprocal hospitality. *McCann* v. *Hoffman*, 9 Cal. 2d 279, 70 P. 2d 909. *Where, however, the driver receives a tangible benefit, monetary or otherwise, which is a motivating influence for furnishing the transportation, the rider is a passenger and the driver is liable for ordinary negligence. See Kruzie* v. *Sanders*, 23 Cal. 2d 237, 143 P. 2d 704; *Druzanich* v. *Criley*, 19 Cal. 2d 439, 122 P. 2d 53; *Whitechat* v. *Guyette*, 19 Cal. 2d 428, 122 P. 2d 47; *Walker* v. *Adamson*, 9 Cal. 2d 287, 70 P. 2d 914; *Kerstetter* v. *Elfman*, 327 Pa. 17, 192 Atl. 663, 664-666. *This is, of course, true whether the trip is for the joint pleasure of the participants or is of a nonsocial nature.*

In the present case the evidence is without substantial conflict, and in our opinion the trial judge, who the record shows gave careful consideration to the problem, correctly determined that the only reasonable inference that could be drawn from the evidence was that plaintiffs gave compensation for their transportation. It is obvious that something more was involved in the arrangements for the trip than a mere exchange of social amenities, and it cannot be disputed that plaintiffs made a substantial contribution toward the cost of the journey. The financial arrangements were definite and businesslike and resulted in a tangible benefit to defendants, a cash payment was made into the common fund by plaintiffs before the commencement of the journey, and in addition to sharing the cost of the operation of the car and the expenses of the two couples,

plaintiffs obligated themselves to pay one-half the cost of the food, lodging and sightseeing for defendants' two sons on an extended trip which might last two or three weeks. The evidence establishes as a matter of law that plaintiffs *compensated defendants for the ride*, and the requested instructions were, therefore, properly refused.

The judgment is affirmed." (Emphasis ours).

9) In the *Harris case, supra,* the plaintiff and defendant were sisters living in California. In July, 1949, the plaintiff and defendant, their mother, and plaintiff's two small children left California on a trip by automobile to Oklahoma and return. It was agreed that plaintiff was to pay for the "*gasoline and oil,*" and while on the trip an accident occurred, when defendant was driving, her car skidding off the highway and injuring plaintiff and she filed suit for damages in California pleading "ordinary negligence." A jury was waived and the trial court held plaintiff was a guest and could not recover by reason of a guest statute. An appeal was taken by plaintiff and the trial court on October 9, 1952, was reversed and a new trial granted by the court of appeals on the ground plaintiff was not barred by the guest statute, the court saying:

"(1) The recent case of *Whitmore* v. *French,* 37 Cal. 2d 744, 235 P. 2d 3, decided by our Supreme Court in 1951, is controlling here. That case states the rule that where the driver receives a tangible benefit, monetary or otherwise, which is a motivating influence for furnishing the transportation, the rider is a passenger and the driver is liable for ordinary negligence. And where one makes a substantial contribution toward the cost of the journey, as a matter of law, he is a passenger and not a guest.

In the Whitmore case two couples on a pleasure trip each contributed to a joint fund out of which expenses for gasoline and oil used in the automobile of one of the couples were paid. It was held that in these circumstances the parties riding in the car were passengers and not guests.

(2) In the case at bar the agreement to pay for gas and oil used on the trip was such a substantial contribution as to make plaintiff a passenger, and the case should have been tried on the theory that defendant was bound to use ordinary care in driving her automobile.

The judgment is reversed, and the cause remanded for a new trial."

Proceedings in Harris Case in California Supreme Court.

10) On October 30, 1952, Harfmann's motion for rehearing was denied. Thereafter Harfmann filed an application for review in the Supreme Court of California, which was permissible, and such was denied by the Supreme Court on December 4, 1952, Edmonds and Schauer dissenting, which two justices dissented in the Whitmore case on the ground it was a jury question as to whether Whitmore and his wife were passengers and not guests. Such shows conclusively the question in issue was considered again by the Supreme Court on the application for review. The State Court report shows the opinion of the court of appeals was concurred in by all the judges. The interpretation by the California Court of Appeals of the Whitmore case certainly should be controlling on the U. S. Court of Appeals, as is also the Whitmore case.

We urge there can be no doubt that the Whitmore case in appiying the tangible benefit and a motivating influence rule as limitations on a pleasure trip show that

the California Supreme Court adopted a more restrictive construction of the word guest in the vehicle code, such before being applied only to business trips. See the late case (1954) of *Thompson* v. *Lacey*, 42 Cal. 2d 443, 267 P. 2d 1. It therefore appears that our Court of Appeals overlooked the change made in the Whitmore case and followed in Harris case as controlling and misconceived the applicable California law.

Record Details of Evidence Pertaining to Transportation.

11) Petitioner's printed record on appeal conclusively shows all the proceedings, pleadings, and all the material and pertinent evidence as to the issues involved on which a decision was reached in the lower courts. Petitioner testified she was given a three weeks annual vacation starting May 30, 1952; that she was planning on taking her father and mother on a vacation to Tacoma, Washington, to visit friends and to find out the distance to Tacoma she called Hedstrom and Hedstrom, finding out what her plans were, said he was ready for a vacation too; that her father knew Hedstrom before she was born and that she had also known the family; that Hedstrom was employed as an engineer at the Kansas City Structural Steel Corporation; that Hedstrom said he would have a two weeks vacation but would have an additional week for making three or four stops for the Steel Company while on the trip; that the trip would include Mrs. Hedstrom and Mrs. Hedstrom's brother, Charles Harling; that Hedstrom said he would take his car and that he had liability and collision insurance. Reference that he had liability and collision insurance was upon objection stricken out (Record pages 8, 9).

12) The record further conclusively shows that the agreement before the trip started with Hedstrom on his proposal expressly obligated petitioner for one-third of the total cost for gasoline, oil, greasing and tire repairs which up to the time of the accident, amounted to $66.82 (having been obtained on his standard oil credit card and charged back to its Kansas City office) as disclosed by an exhibit in the handwriting of Hedstrom itemizing the cost of the four items; that after he came back to Kansas City he with the itemized statement made a written demand on petitioner for $22.27, assessing the same against her as her part for her transportation (which was arrived at as a result of dividing $66.82 by 3) thus showing that your petitioner and Harling were assessed a total of $44.54 and Hedstrom assumed the other $22.27, further showing that his wife was not assessed, and paid nothing (Record pages 10, 11, 7, 16). Hedstrom was not only charging petitioner for the ride but also was charging Harling, and such was not upon a *per capita* basis covering the four in the car. Petitioner and Harling were charged two-thirds. On page 16 of the record petitioner testified "Mr. Hedstrom told me that the charges would be divided into thirds and I accepted it"; that upon starting the trip Hedstrom with his wife and Harling in the car, drove to the residence of petitioner where she entered the car, Hedstrom putting her two bags in the trunk, and they proceeded on the trip on May 30th from Kansas City (Record 12).

Error of the Court of Appeals.

13) The U. S. Court of Appeals, we urge, erred in ruling that the controlling California law was that "the mere showing of expenses among traveling friends on a social trip does not constitute payment of compensation for transportation." For this statement the court cites three

California cases including the Whitmore case, and a Kansas case decided by it on Kansas law which has no application. These three cases do not support the ruling and the court misconceived the issue and facts. *The court fails to mention the Harris case cited in our brief which construes the Whitmore case as we construe it.* The court passed in silence the Harris case which is like the case at bar. The Harris case has never to date been overruled, and, we urge, is controlling on the Federal court as to law of California, and in addition the Supreme Court of California in denying a review of the interpretation by the California Court of Appeals of the Whitmore case approved the court of appeals interpretation of the Whitemore opinion, two of the seven justices dissenting, as they had done in the Whitmore case, solely on the ground that whether Whitmore and his wife were passengers and not guests was a jury question, and not, as the majority held, passengers as a matter of law (see the dissenting opinion). We believe the approval above referred to also gave the Harris case the standing and effect of a Supreme Court decision.

14) The U. S. Court of Appeals in its opinion cast aside not only the Harris case, but also on page 9 of the opinion cast aside and failed to mention the controlling statement of the Supreme Court of California in the Whitmore case following what it quoted in its opinion from this case the following:

> "Where, however, the driver receives a tangible benefit, monetary or otherwise, which is a motivating influence for furnishing the transportation, the rider is a passenger and the driver is liable for ordinary negligence."

15) The majority opinion of the Supreme Court of California held Whitmore and his wife were passengers as

a matter of law, and not barred by the guest statute and the dissent was as above stated predicated solely on the ground this issue was a *jury question*, while the U. S. Court of Appeals *holds as a matter of law* that there was not even a jury question as to whether petitioner in the case at bar was a passenger or a guest. Such ruling we urge was contrary to and contravened the controlling law of California as held in the Whitmore and Harris cases, when even under the dissenting opinion in the Whitmore case petitioner was entitled to a trial by jury.

16) The controlling law of California as announced in the recent cases of Whitmore and Harris, following by more than ten years the McCann and Whitechat cases cited by the court of appeals, are controlling, on the facts of the case at bar, the Whitmore and Harris cases involving an agreed division of cost, holding that a division of expenses did not bar recovery, if such, however, was a tangible benefit to the driver which was a motivating influence for furnishing the transportation. In the McCann cases there was at most only a *tacit* and unexpressed understanding to share expenses. This case is criticized in 26 Calif. L. Rev. 251. The Whitechat case was a *per curiam* opinion and sustained a jury verdict of $8,000.

Here in the case at bar the petitioner under the agreement made before the trip started was obligated for one-third of the cost of the "gasoline, oil, greasing and tire repairs" which one-third up to the time of the accident amounted to $22.11 for her transportation (which was more than her *per capita* share, as four were being transported and a "substantial contribution" to the trip), while in the Harris case, Mrs. Harris was to contribute the cost of the gasoline and oil, the court holding such made her a passenger, and in the Whitmore case there was a division of 50 per cent between the two Whitmores and the

two Frenches of the cost, including Frenches' two sons, and the court held Whitmore and his wife were passengers. In the case at bar Mrs. Hedstrom, like Frenches' sons, contributed nothing.

17) The agreement petitioner made with Hedstrom on his proposal was substantial and much more than the payment of bridge or ferry tolls or social amenities. The proposal made before the trip by Hedstrom resulting in the expressed agreement cannot by any stretch of the imagination be likened to an exchange of social amenities. However, if it can be held such was an exchange of social amenities (which it was not) yet if Hedstrom "received a tangible benefit, monetary or otherwise which was a motivating influence for furnishing the ride, the rider was a passenger and the driver is liable for ordinary negligence" as held in the Whitmore and Harris cases. The crux and deciding issue in the Whitmore and Harris cases as well as in the case at bar was the contribution of a tangible benefit to Hedstrom and a motivating influence for furnishing the ride. Even under the dissenting opinion in the Whitmore case the two dissenters thought such was a jury issue or question.

An Example.

Assume "A" and "B" lawyers friends in Los Angeles had cases in the Supreme Court at Sacramento, set for argument on the same day, and "A" knowing such called "B" and said "I will take you in my car if you will assume the cost of the gasoline," and "B" says "O. K." and goes with "A," would "B" be a guest under the California guest statute? Certainly not.

Side References.

18) The opinion of the court of appeals stresses in cross examination of petitioner, in question and answer form, that they were all just friends on the trip but the counsel for Hedstrom says he "meant you weren't hiring Mr. Hedstrom or his automobile for any purpose" to which she answered, "No," and concluding that the "whole idea was to arrive at some friendly, mutual understanding, of sharing the expenses, isn't that right," to which she answered, "that is right." (R. 15).

19) The opinion then makes references that when defendant later submitted a statement to plaintiff for one-third of the total expenses (at the time of the accident which ended the trip) of the items, amounting to $22.67 against plaintiff, that "she did not pay him," but overlooked her statement as to why she did not pay it then, but later upon objection by counsel defendant being sustained, the matter ended (R. 11).

20) In the face of the admitted agreement as disclosed by the record and the opinion, we believe the stressing of friendship and whether or not she was "hiring" Mr. Hedstrom or his automobile, is of no moment, and should have no place in the opinion. Friends may make a valid agreement, and the matter was not one of "hiring" Hedstrom or his automobile. These side references prove nothing under the California law. The issue under the Vehicle Code was whether or not she *"was giving compensation for such ride."* The "trap" set for petitioner, a woman without legal learning, by the use of the word "hiring" did not fit the case, and was unfair and the court overlooked such, and there is no evidence that she was not giving compensation for the ride within the meaning of the Vehicle Code. This is not a master and servant case. A

person riding on a train or bus does not "hire" the train or bus, or the railroad or bus company.

Urgent Need for Certiorari.

This court in *Meredith et al.* v. *The City of Winterhaven,* 320 U. S. 228, 64 S. Ct. 7, 12, said:

> "*Erie R. Co.* v. *Tompkins, supra,* did not free the Federal courts from the duty of deciding questions of state law in diversity cases. Instead it placed on them a greater responsibility for determining and applying state law in all cases within their jurisdiction in which federal law does not govern."

The Facts presented, we urge, entitle this humble woman with injuries to certiorari to the end that she may have a jury trial under the controlling law of the state of California. To her this is a most important case. We think it is the duty of this court to see that petitioner is given a trial under the applicable California law, respondent having removed the case to the Federal Court.

Mandate.

21) Petitioner on May 27, 1955, filed a motion for stay of mandate pending application for certiorari, in which it was stated she intended to apply for Certiorari and prayed she be given to September 12, or such time, as is permissible under the law. On June 2nd a stay (probably by the clerk) was granted for 30 days after June 2, *provided* within such time there was filed with the clerk of the court at St. Louis a certificate of the clerk of this court that a petition for certiorari and record had been filed whereby the stay granted would continue until final disposition of the case. Such we urge, was unreasonable, and petitioner could not arrange to comply with this condition including printing, docket fee, distance from courts

and etc., and providing the money therefor. Further after investigation of the law concluded such requirement was not only contrary to the statute, section 2101, 28 U. S. C. A., page 67, giving 90 days to apply for certiorari, but was also immaterial and contrary to the ruling of this court in *"The Conqueror,"* 166 U. S. 110, 17 S. Ct. 510, and particularly so in view of the nature of the judgment affirmed, which only provided for recovery of costs and execution therefor (R. 4) and will not be paid pending certiorari. However, if material under Rule 3 of the court of appeals the general term will not end until the second Wednesday in September, or September 14, and it may recall the mandate, upon notice of filing the application for Certiorari within 90 days. The rule also provides among other things that any rule inconsistent with a U. S. Statute or rules of this court must be disregarded.

Respectfully submitted,

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Dated August 5, 1955.